TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 242

NASSAU SMELTING & REFINING WORKS, LTD.,
PETITIONER,

vs.

BRIGHTWOOD BRONZE FOUNDRY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 7, 1923

CERTIORARI AND RETURN FILED JUNE 30, 1923

(29,447)

(29,447)

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 6, 1923

[fol. 1] **UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1921**

No. 1578

NASSAU SMELTING & REFINING WORKS, LTD., CREDITOR, APPELLANT,

v.

BRIGHTWOOD BRONZE FOUNDRY COMPANY, BANKRUPT, APPELLEE

Transcript of Record of District Court

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

No. 28216. In Bankruptcy

IN THE MATTER OF BRIGHTWOOD BRONZE FOUNDRY COMPANY, Bankrupt

CREDITORS' PETITION—Filed November 5, 1920, at 11 o'clock A. M.

To the Honorable James M. Morton, Jur., Judge of the District Court of the United States for the District of Massachusetts:

The petition of the Charles C. Lewis Company, a corporation duly organized by law and located in Springfield, Hampden County, Massachusetts, American Law & Manufacturing Company, a corporation duly organized by law and located in Springfield, Massachusetts, Bay State Crucible Company, a corporation duly organized by law and located in Taunton, Massachusetts, respectfully shows that Brightwood Bronze Foundry Company, a corporation duly organized by law [fol. 2] and located in Springfield, Massachusetts, has for the greater portion of six months next preceding the date of the filing of this petition, had its principal place of business [or resided, or had his domicile] at Springfield in the county of Hampden and State and district aforesaid, and owes debts to the amount of $1,000. That your petitioners are creditors of said Brightwood Bronze Foundry Company having provable claims amounting in the aggregate, in excess of securities held by them to the sum of $500. That the nature and amount of your petitioner's claims are as follows:

The Charles C. Lewis Company, merchandise sold and delivered	$90.42
American Law and Manufacturing Company, merchandise sold and delivered	$732.77
Bay State Crucible Company, merchandise sold and delivered	$1,075.06

And your petitioners further represent that said Brightwood Bronze Foundry Company is insolvent, and that within four months

next preceding the date of this petition the said Brightwood Bronze Foundry Company committed an act of bankruptcy, in that it did heretofore, to wit, on the eighth day of September, 1920, made a general assignment for the benefit of its creditors, to one Henry Lasker of Springfield, Massachusetts.

Wherefore, your petitioners pray that service of this petition, with a subpœna, may be made upon Brightwood Bronze Foundry Company, as provided in the Acts of Congress relating to bankruptcy, and that it may be adjudged by the court to be a bankrupt within the purview of said acts.

Bay State Crucible Company, By James M. Westgate, Treasurer [Seal.]; The Charles C. Lewis Company, By Charles A. Bemis, Assistant Treasurer [Seal.]; American Saw & Manufacturing Company, [Seal], C. G. Davis, Treasurer, Petitioners. Ballard & Weston, Attorneys. Address 374 Main Street, Springfield, Mass.

[fol. 3] UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Charles A. Bemis, Carl G. Davis, James M. Westgate, being treasurers and chief financial officers of three of the petitioners abovenamed, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by said petitioners, are true.

James M. Westgate, Charles A. Bemis, Carl G. Davis, Petitioners.

Before me, by Charles A. Bemis, this nineteenth day of October, 1920. Charles Thurston, Notary Public.

Before me, by Carl G. Davis, this eighteenth day of October, 1920. George A. Bacon, Notary Public. [Seal.]

Before me, by James M. Westgate, this thirtieth day of October, 1920. Charles R. Hodges, Notary Public. [Seal.]

ADJUDICATION OF BANKRUPTCY

At Boston, in said District, on the nineteenth day of November, A. D. 1920. Before the Honorable James M. Morton, Jr., judge of said court in bankruptcy, the petition of Bay State Crucible Co. et al., that Brightwood Bronze Foundry Company be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said Brightwood Bronze Foundry Company is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable James M. Morton, Jr., judge of said court, and the seal thereof, at Boston, in said District on the nineteenth day of November, A. D. 1920.

Mary E. Prendergast, Deputy Clerk. [Seal.]

[fol. 4] SCHEDULE A—STATEMENT OF ALL DEBTS OF BANKRUPT—Filed February 16, 1921, at 9 o'clock A. M.

Schedule A (1)

* * * * * * *

Schedule A (3)

Creditors Whose Claims are Unsecured

* * * * * * *

Nassau Smelting and Refining Works

W. 29 St., New York City; 1920, Springfield , Mass.

* * * * * * *

	Amount Dollars, cents
Merchandise	11,354.40
Total [carried forward]	46,630.73

* * * * * * *

IN UNITED STATES DISTRICT COURT

AGREEMENT AS TO CERTAIN FACTS—Filed July 5, 1922

In the above-entitled cause, it is agreed that the Brightwood Bronze Foundry Company made a general assignment for the benefit of its creditors to Henry Lasker, the bankrupt's attorney, on the tenth day of September, 1920.

That said Henry Lasker took possession of the assets and is still holding possession of the same.

That on February 12, 1921, the bankrupt made an offer of composition of twenty-five per cent (25%) cash, and the meeting to consider the same was held on February 25, 1921.

That at the date of the offer, the Nassau Smelting & Refining Works, Ltd., has not filed or offered for proof, its proof of claim, and had not filed its proof of claim for allowance, within a year of the date of adjudication, but that at the date of the petition to limit the amount of the composition, the claim of the Nassau Smelting & Refining Works, Ltd., had neither been allowed nor disallowed, but was offered for proof on or about the sixth day of April, 1922.

That the claims proved and allowed amount to $34,058.50.

[fol. 5] That a special meeting of creditors to elect a trustee was held March 17, 1922, and Harry M. Ehrlich was elected trustee but has never qualified.

That the Nassau Smelting & Refining Works, Ltd., had received due notice of all the proceedings in bankruptcy.

Jacobs & Jacobs, Attorneys for the Appellant. Henry Lasker, Attorneys for the Appellee. Harry M. Ehrlich, Attorney for Creditors.

IN UNITED STATES DISTRICT COURT

PETITION FOR ORDER IN RE COMPOSITION—Filed March 27, 1922

To the Honorable James M. Morton, Jr., Judge of the United States District Court:

Representing the bankrupt, through Jacob Magaziner, its treasurer, and sets forth that the date of adjudication in the above entitled matter was November 19, 1920; that many of the creditors have proved their claims within the time allowed by Sec. 57 (N) (of the Act to Establish a Uniform System of Bankruptcy, 1908, and amendments thereto) according to a schedule hereto annexed marked "A;" that many of the creditors, although properly scheduled, have failed to prove their claims seasonably which list of creditors is hereinafter set out in the schedule hereto annexed marked "B;" that the petitioner has made an offer in composition of 25 per cent cash, which offer has been accepted by a majority in amount and number of creditors as required by law; that the bankrupt is now required to deposit the funds necessary to complete said composition; that if the bankrupt is required to deposit funds in the amount called for by the schedules, including the claims proved seasonably and those which are not now provable, it will cause a great hardship on the bankrupt, and make necessary the abandonment of the composition proceedings.

Wherefore your petitioner prays;

That this court order such sum deposited, as shall be sufficient to [fol. 6] pay, in composition, only such claims as were seasonably proved, together with all reasonable expenses of administration.

Dated this twenty-fifth day of March, 1922, at Springfield, Mass.

Brightwood Bronze Foundry Company, By Jacob Magaziner, Its Treasurer.

Sworn to before me this twenty-fifth day of March, 1922. Harry M. Ehrlich, Notary Public. My commission expires November 10, 1927.

IN UNITED STATES DISTRICT COURT

ORDER ON PETITION AS TO NOTICE—March 27, 1922

On the twenty-seventh day of March, 1922, on reading the foregoing petition: It is ordered by the court, that a hearing be had upon the same on the sixth day of April, 1922, before said court, at

Boston, in said District, and that all known creditors and other persons in interest may appear at the said time and place, and show cause, if any they have, why the prayer of said petitioner should not be granted.

And it is further ordered by the court, That the clerk of said court shall send by mail to all known creditors, notices of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable James M. Morton, Jr., judge of said court, and the seal thereof, at Boston, in said District, on the twenty-seventh day of March, 1922.

Mary E. Prendergast, Deputy Clerk.

I hereby certify that I have on this twenty-seventh day of March, 1922, sent by mail, franked, notices of the within order as therein directed.

Mary E. Prendergast, Deputy Clerk.

[fol. 7] To the foregoing order on petition as to notice is annexed a list of unsecured claims amounting to $34,058.50 which have been proved and allowed, marked "A," and a list of unsecured claims scheduled, not proved, marked "B," which are here omitted.

The claim of the Nassau Smelting & Refining Works, Ltd., was not listed among the proved and allowed claims, said claim not having been offered for proof until after the year had expired and which has not as yet been allowed or disallowed.

IN UNITED STATES DISTRICT COURT

APPEARANCE OF NASSAU SMELTING & REFINING WORKS, LTD., OBJECTING TO PETITION—Filed April 1, 1922

Nassau Smelting & Refining Works, Ltd., a creditor in said matter, appears and objects to the said petition that deposit under composition be limited to only those creditors whose claims have been proved and allowed.

By its Attorneys, Jacobs & Jacobs, 45 Milk Street, Boston.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING PETITION AS TO DEPOSIT—May 8, 1922

At Boston, in said District, on the eighth day of May, A. D. 1922, upon the petition of the bankrupt that the deposit under composition offer be sufficient only for those creditors whose claims have been proved and allowed; now therefore, upon the objections thereto filed by Nassau Company, creditor, and after hearing arguments of Joseph B. Jacobs, Esq., of counsel for the Nassau Company, and of Harry M. Ehrlich Esq., counsel for the bankrupt, and after due consideration of the same:

It is hereby ordered and decreed that said petition be and it hereby is granted.

Witness the Honorable James M. Morton, Jr., judge of said court, and the seal thereof, this eighth day of May, A. D. 1922.

Mary E. Prendergast, Deputy Clerk. [Seal.]

[fol. 8] IN UNITED STATES DISTRICT COURT

MEMORANDUM OF DECISION

May 5, 1922

MORTON, J.:

This is a composition case; and the question is whether the bankrupt must deposit enough to pay the offered percentage on all scheduled claims, or only on claims which were proved and allowed within one year after adjudication. The adjudication was on November 19, 1920; the composition offer was filed February 12, 1921.

The decision turns on whether section 57n, which provides that "Claims shall not be proved against a bankrupt estate subsequent to one year after adjudication," applies to composition proceedings. The exact point was fully and carefully considered by Judge Lowell in In re Lane, 125 F. R. 772, and by Judge Dodge in In re French, 181 F. R. 583, and In re Blond, 188 F. R. 452, in all of which cases it was held that section 57n did apply. In the case last mentioned Judge Dodge said, "If the bankrupt had asked to be excused from depositing a dividend on this claim, on the ground that it had been barred, I do not see how his request could have been refused. This creditor would have had no standing to oppose it." The same conclusion was more recently reached in an able and careful opinion by Judge Sibley in In re Bickmore Shoe Company, 263 F. R. 926.

In In re Atlantic Const. Co., 228 F. R. 571, Judge Learned Hand took a different view and differentiated between compositions in which the offer is made within a year after adjudication and those in which it is made more than a year after adjudication, and distinguished In re French on that ground. But if section 57n applies to composition proceedings at all, I doubt whether the discrimination suggested, which is not found in the statute, can be set up by the court. As Judge Sibley points out, section 12 which relates to composition explicitly provides for the proof and allowance of claims, and only claims which have been proved and allowed are entitled to share. This being so, it seems to me, as it did to him, that where an offer is made after adjudication section 57n is applicable. Even [fol. 9] if I thought otherwise, I ought to follow the decision referred to in this district.

The claim of the Nassau Company need not be provided for in the deposit.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL OF NASSAU SMELTING & REFINING WORKS, LTD., AND ORDER ALLOWING SAME—Filed May 18, 1922

To the Honorable James M. Morton, Jr., District Judge:

And now comes the Nassau Smelting & Refining Works, Ltd., and feeling itself aggrieved by the order entered in the above entitled case on the eighth day of May, 1922, does hereby appeal from said order to the Circuit Court of Appeals for the First Circuit, for the reasons set forth in the assignment of errors filed herewith, and it prays that this appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and the document upon which said order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the First Circuit, sitting at Boston, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

Nassau Smelting and Refining Works, Ltd., By Its Attorneys,
Jacobs & Jacobs.

Appeal allowed May 18, 1922. J. M. Morton, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed May 18, 1922

And now comes the Nassau Smelting & Refining Works, Ltd., a creditor of the above entitled bankrupt, and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the order made by this Honorable Court on the eighth day of May, 1922.

[fol. 10] I. That the United States District Court for the District of Massachusetts erred in granting the motion of the bankrupt that it be allowed to deposit for its composition, only a sum sufficient to pay the composition dividend on claims proved and allowed.

II. That the United States District Court for the District of Massachusetts erred in not requiring the bankrupt to deposit a sum sufficient to pay the composition dividend on the total amount of the claims scheduled.

Wherefore, the appellant prays that said order be reversed.

Jacob & Jacobs, Attorneys for Appellant.

In United States District Court

Bond on Appeal—Filed and approved May 18, 1922. [Morton, J.; for $250.00; omitted in printing]

[fol. 11] In United States District Court

Præcipe for Transcript—Filed July 5, 1922

To the Clerk of the United States District Court for the District of Massachusetts:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the First Circuit, pursuant to an appeal allowed in the above-entitled cause, and to include in said transcript the following:

Involuntary petition in bankruptcy.

Adjudication in bankruptcy.

The following portions of the schedules:

"Unsecured liabilities $46,630.73, including the Nassau Smelting & Refining Works, Ltd., scheduled at $11,354.40."

Statement in the record that on September 10, 1920, the Brightwood Bronze Foundry Company made an assignment to Henry Lasker, who received possession of the assets on that date, and is now holding the same.

Petition for order to limit amount of composition, entitled "Petition for Order in re Composition."

Order on the petition as to notice, etc., omitting list of claims proved and allowed, but stating that claims in the amount of $34,058.50 were proved and allowed, but said list did not include the claim of the Nassau Smelting & Refining Works, Ltd., which claim was not offered for proof until after the year had expired, but which claim has not, at the present time, been allowed or disallowed as yet.

[fol. 12] A meeting for the election of trustee was held on the seventeenth day of March, 1922, and Harry M. Ehrlich was elected trustee, but has never qualified.

The offer of composition was filed February 12, 1921, and the meeting to consider same was held February 25, 1921.

Opinion of the court.

Order of May 8th.

Appearance of the Nassau Smelting & Refining Works, Ltd., objecting to the petition to limit composition deposit.

Jacobs & Jacobs, Attorneys for Appellant.

Assented to.

Henry Lasker, Attorney for Brightwood Bronze Foundry Company. Harry M. Ehrlich, Attorney for Creditors.

In United States District Court

Citation and Service

United States of America, ss:

The President of the United States to the Brightwood Bronze Foundry Company, a Bankrupt, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the sixteenth day of June next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein the Nassau Smelting & Refining Works, Ltd., a creditor, is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice not be done to the parties in that behalf.

Witness, the Honorable James M. Morton, Judge of the District Court of the United States for the District of Massachusetts, this [fol. 13] eighteenth day of May, in the year of our Lord one thousand nine hundred and twenty-two.

James M. Morton, Jr., United States District Judge.

Acknowledgements of Service of Citation on Appeal

June 8, 1922.

I hereby accept service in behalf of the bankrupt.

Henry M. Ehrlich.

June 8, 1922.

I hereby accept service in behalf of the bankrupt.

Henry Lasker.

In United States District Court

Clerk's Certificate

United States of America,
District of Massachusetts, ss:

I, John E. Gilman, Jr., Deputy Clerk of the District Court of the United States, within and for the District of Massachusetts, and during the temporary absence of the clerk in charge of the affairs of the clerk's office of said court, and the custodian of its files and records, do hereby certify that the foregoing are true copies of the portions of the record which the parties have agreed shall constitute the appeal record of the Nassau Smelting & Refining Works, Ltd., a creditor, from the order entered May 8, 1922, in the cause entitled, No. 28,216, in bankruptcy, in the matter of Brightwood Bronze Foundry Company, Bankrupt, together with the original Citation and the Acknowledgments of Service thereon.

And I further certify that the adjudication of bankruptcy in said matter was made on the nineteenth day of November, A. D. 1920.

In testimony whereof I hereunto set my hand and affix the seal [fol. 14] of said court, at Boston, in said District, this first day of August, A. D. 1922.

John E. Gilman, Jr., Deputy Clerk. (Seal.)

In United States District Court

Order of Enlargement of Time for Docketing Case and Filing Record

June 13, 1922

Morton, J.:

For good cause shown, it is ordered that the time for docketing this case and filing the record thereof in the United States Circuit Court of Appeals for the First Circuit be enlarged to and including Tuesday, August 1, 1922.

By the Court.

James S. Allen, Clerk.

[fol. 15] In U. S. Circuit Court of Appeals

Clerk's Certificate

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 14, inclusive, hereto prefixed, contain and are a true copy of the record in the cause in said court numbered and entitled: No. 1578, Nassau Smelting & Refining Works, Ltd., Creditor, Appellant, v. Brightwood Bronze Foundry Company, Bankrupt, Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twenty-eighth day of February, A. D. 1923.

Arthur I. Charron, Clerk. [Seal of the United States Circuit Court of Appeals, First Circuit.]

[fol. 16] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, October Term, 1921

[Title omitted]

PETITION OF NASSAU SMELTING & REFINING WORKS, LTD., TO REVISE IN MATTER OF LAW THE PROCEEDINGS OF THE DISTRICT COURT—Filed in Circuit Court of Appeals August 3, 1922

To the Honorable the Judges of the Circuit Court of Appeals for the First Circuit:

Your petitioner, the Nassau Smelting & Refining Works, Ltd., respectfully shows:

That it is a corporation duly organized by law, with a usual and principal place of business in the City, County and State of New York, and is a creditor in the amount of $11,356.44 of the Brightwood Bronze Foundry Company, which was adjudged bankrupt by the District Court of the United States for the District of Massachusetts, on the nineteenth day of November, 1920, upon an involuntary petition in bankruptcy filed on the fifth day of November, 1920.

That previous to the filing of the involuntary petition in bankruptcy, the bankrupt made a general assignment for the benefit of its creditors on the tenth day of September, 1920, to one Henry Lasker, the bankrupt's attorney, and said Henry Lasker, down to [fol. 17] the date of the filing of this petition, has remained in possession of the assets of the bankrupt.

That after the aforesaid adjudication in bankruptcy, the bankrupt made an offer of composition on February 12, 1921, of twenty-five per cent (25%) cash, and a meeting to consider the composition was held on February 25, 1921.

That the fund necessary to put through said composition has not been deposited with the clerk of the United States District Court as is required by law.

That on or about the twenty-seventh day of March, 1922, the bankrupt filed a petition to be permitted to deposit, to meet the composition offer, a fund sufficient only to pay those creditors whose claims had hitherto been proved and allowed.

That your petitioner appeared and objected to the aforesaid petition of the bankrupt.

That your petitioner's claim was not filed or allowed within the year of the date of the adjudication in bankruptcy, but your petitioner has since filed its claim and seeks to have the same allowed in order to share in the composition dividend.

That your petitioner claims the right to have sufficient funds deposited to pay the composition dividend on its claim.

That the matter came on for hearing in the United States District Court for the District of Massachusetts, on said petition of the bankrupt and on your petitioner's objection thereto, and the United States

District Court handed down an opinion on the fifth day of May, 1922, a copy of which is hereto annexed, marked "A," and on the eighth day of May, 1922, entered an order, a copy of which is hereto annexed, marked "B," granting the motion of the bankrupt, and giving permission to the bankrupt to deposit only such sums as were necessary to pay the composition dividend on claims proved and allowed.

And your petitioner further says that the adverse party against whom relief is sought is the Brightwood Bronze Foundry Company, who were represented in the court below by Henry Lasker.

Wherefore, your petitioner, feeling aggrieved because of said order, asks that the same be revised in matter of law, by this Honorable [fol. 18] Court, as provided in Section 24 B of the Bankruptcy Act of 1898, and the rules and practice in such cases provided.

Nassau Smelting & Refining Works, Ltd., By its Attorney, Joseph B. Jacobs.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

I, Joseph B. Jacobs, duly authorized attorney for the Nassau Smelting & Refining Works, Ltd., do hereby make solemn oath that the statements herein contained are true, according to the best of my knowledge, information and belief.

Joseph B. Jacobs.

Subscribed and sworn to before me this third day of July, 1922. Sarah A. Corrigan, Notary Public.

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS

In Bankruptcy. No. 28216

In re BRIGHTWOOD BRONZE FOUNDRY COMPANY, Bankrupt

EXHIBIT "A" TO PETITION TO REVISE

Memorandum of Decision

May 5, 1922

MORTON, J.:

This is a composition case; and the question is whether the bankrupt must deposit enough to pay the offered percentage on all scheduled claims, or only on claims which were proved and allowed within one year after adjudication. The adjudication was on November 19, 1920; the composition offer was filed February 12, 1921.

The decision turns on whether Section 57n, which provides that "Claims shall not be proved against a bankrupt estate subsequent

to one year after adjudication," applies to composition proceedings. The exact point was fully and carefully considered by Judge Lowell in In re Lane, 125 F. R. 772, and by Judge Dodge in In re [fol. 19] French, 181 F. R. 583, and In re Blond, 188 F. R. 452, in all of which cases it was held that Section 57n did apply. In the case last mentioned Judge Dodge said: "If the bankrupt had asked to be excused from depositing a dividend on this claim, on the ground that it had been barred, I do not see how his request could have been refused. This creditor would have had no standing to oppose it." The same conclusion was more recently reached in an able and careful opinion by Judge Sibley in In re Bickmore Shoe Co., 263 F. R. 926.

In In re Atlantic Const. Co., 228 F. R. 571, Judge Learned Hand took a different view and differentiated between compositions in which the offer is made within a year after adjudication and those in which it is made more than a year after adjudication, and distinguished In re French on that ground. But if section 57n applies to composition proceedings at all, I doubt whether the discrimination suggested, which is not found in the statute, can be set up by the Court. As Judge Sibley points out, section 12 which relates to composition explicitly provides for the proof and allowance of claims, and only claims which have been proved and allowed are entitled to share. This being so, it seems to me, as it did to him, that where an offer is made after adjudication section 57n is applicable. Even if I thought otherwise, I ought to follow the decisions referred to in this District.

The claim of the Nassau Company need not be provided for in the deposit.

District Court of the United States, District of Massachusetts

No. 28216. In Bankruptcy

In re Brightwood Bronze Foundry Co., Bankrupt

Exhibit "B" to Petition to Revise

Order Granting Petition as to Deposit

May 8, 1922

At Boston on the eighth day of May, A. D., 1922, upon the petition of the bankrupt that the deposit under composition offer be [fol. 20] sufficient only for those creditors whose claims have been proved and allowed; now, therefore, upon the objections thereto filed by Nassau Company, creditor, and after hearing argument of Joseph B. Jacobs, Esq., of counsel for Nassau Company, and of Harry M. Erlich, Esq., counsel for the bankrupt, and after due consideration of the same: It is hereby Ordered and Decreed that said petition be and it hereby is granted.

Witness the Honorable James M. Morton, Jr., Judge of said Court, and the seal thereof, this eighth day of May, A. D. 1922.

Mary E. Prendergast, Deputy Clerk. (Seal.)

IN U. S. CIRCUIT COURT OF APPEALS

STIPULATION AS TO TRANSCRIPT—Filed September 18, 1922

It is agreed that the transcript of the record on the appeal in case number 1578, Nassau Smelting & Refining Works, Ltd., Creditor, Appellant, v. Brightwood Bronze Foundry Company, Bankrupt, Appellee, may be used in the presentation and argument of the petition to superintend and revise brought by the Nassau Smelting & Refining Works, Ltd., against the Brightwood Bronze Foundry Company, reserving to the appellee the right to move that the appellant elect to proceed on either the appeal or petition to superintend and revise.

Jacobs & Jacobs, Attorneys for Petitioner. Henry Lasker, Attorney for Respondent.

[fol. 21] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1922

[Title omitted]

Appeal from, and Petition to Revise, the District Court of the United States for the District of Massachusetts

Before Bingham, Johnson, and Anderson, JJ.

OPINION OF THE COURT—January 4, 1923

BINGHAM, J.:

This is a petition under Section 24b of the bankruptcy act of 1898 to revise in matter of law proceedings of the District Court for Massachusetts.

An involuntary petition in bankruptcy was filed in the District Court against the Brightwood Bronze Foundry Company on November 5, 1920, and on November 19, 1920, it was adjudicated a bankrupt. The bankrupt duly filed schedules of its property and a list [fol. 22] of its creditors as required by Sec. 7, clause 8, of the act, and included in its schedules the present petitioner, the Nassau Smelting & Refining Works, as a creditor in the sum of $11,354.40. On February 12, 1921, and before the expiration of a year from the date of adjudication, the bankrupt made an offer of composition to its creditors and a meeting of creditors to consider the offer was held February 25, 1921. On March 27, 1922, the Nassau Smelting & Refining Works, having failed to prove and file its claim for $11,354.40 within a year from adjudication, the bankrupt, the Foundry

Company, petitioned the court to be permitted to deposit, to meet the composition offer, a fund sufficient to pay creditors whose claims had been proved and allowed within a year from adjudication, together with all reasonable expenses of administration. Notice of the petition having been given, the Nassau Smelting & Refining Works appeared and objected to the granting of the petition and asked leave to file its proof of claim. The petition to limit the amount of the deposit was granted and the Nassau Smelting & Refining Works brought this proceeding to revise, and also appealed from the order.

It is conceded that the Nassau Smelting & Refining Works received due notice of all proceedings in bankruptcy and it does not appear that its failure to have its claim proved and filed was due to any misconduct of the bankrupt; the sole question is whether the limitation placed upon the proof and filing of claims by Sec. 57n of the bankruptcy act applies to composition proceedings under that act.

Sec. 57n, so far as here material, reads as follows:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication."

There can be no question but that in the ordinary bankruptcy case the claim of a creditor, although included in the bankrupt's schedules, in the absence of fraud practised by the bankrupt, must be proved and filed within one year from the date of adjudication, and the question is whether, under the composition provisions of the act a creditor's right to share in a composition offer is likewise limited. [fol. 23] By Sec. 12a a bankrupt may offer terms of composition to his creditors after he has been examined in open court or at a meeting of his creditors, provided he has filed schedules of his property and a list of his creditors; and by subdivision b of the same section "an application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge." By Sec. 12c, "upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided." By Sec. 14c, "the confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge." Sec. 17 defines the debts not affected by a discharge.

Sec. 57, and subdivisions a to m inclusive, provide the method by which claims may be proved and allowed and are applicable whether the bankrupt is seeking a discharge through composition or through the administration and distribution of his estate in the

ordinary course, and the method of proof being the same it is difficult to see how Congress could have intended that the limitation provided by subdivision n of that section, which undoubtedly applies to the proof and allowance of claims under Sec. 57 when the estate is administered in the ordinary course, should not also apply to composition, where there has been an adjudication in bankruptcy.

In the construction and application of these provisions in the Massachusetts District and elsewhere through a long series of years, a creditor, in the absence of fraud practiced upon him, has not been permitted to prove and file a claim after the expiration of a year [fol. 24] from adjudication and participate in an offer of composition, and no sufficient reason has been suggested and none occurs to us for reaching a different conclusion. See In re Lane (D. C. Mass.), 125 Fed. 772; In re Blond (D. C. Mass.), 188 Fed. 452; In re French (D. C. Mass.), 181 Fed. 583; In re Brown (D. C. Col.), 123 Fed. 336; In re Bickmore Shoe Co. (D. C. Ga.), 263 Fed. 926.

In In re Lane, supra, decided by the District Court of Massachusetts in 1902, appeared that the petitioner had failed through inadvertence to prove his claim within a year of adjudication; that the bankrupt had offered a composition which had been duly accepted and a sufficient deposit made; that some of the creditors had failed to claim their dividends; and that the petitioning creditor sought to prove his claim and obtain payment from the surplus left in the hands of the court. It was held that the petition to be allowed to prove the claim should be denied. In re Lane was cited with approval by the Supreme Court in Cumberland Glass Co. v. De Witt, 237 U. S. 447, 453, (1915), and, such being the case, we regard it as indicating that that court considered Sec. 57n applicable to proof of claims in composition.

Then again, as Sec. 12a, as amended in 1910, provides that: "A bankrupt may offer, either before or after adjudication, terms of composition to his creditors, etc.," it is contended that a composition may be had without adjudication and if a composition were had without adjudication there would be no time fixed from which the year would run to bar the proof of claims under Sec. 57n. But notwithstanding a bankrupt may offer composition before adjudication, it does not follow that adjudication may not thereafter be had for the purpose of barring claims. The act, as a whole, contemplates, and the language used in Section 12 implies that adjudication may and will be had if it is desired to bar the proof of claims or if composition has for any reason failed and the estate is to be administered in the ordinary course (Sec. 12e). Composition is a proceeding in bankruptcy (Wilmot v. Mudge, 103 U. S. 217), and, as the proof of a claim may be barred where the estate is administered in the ordinary [fol. 25] course, there is no reason why it may not be barred when composition is had by taking the necessary steps to fix the time from which the statute may run.

The appeal is dismissed with costs to the appellee. In the proceeding to superintend and revise it is ordered that the decree of the District Court be affirmed with costs to the Brightwood Bronze Foundry Company.

In U. S. Circuit Court of Appeals

Dissenting Opinion

Anderson, J. (dissenting):

I cannot concur. I think §57n has no application to composition proceedings. No one can contend that it applies to composition before adjudication. In recent years more than two-thirds of the composition cases in this district have been without adjudication. In such cases there is no adjudication from which to date the year, nor any bankrupt estate; the debtor is never divested of his estate under §70a, and, on confirmation, it never revests under §70f. As matter of literal construction, the words, "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication," clearly cannot be applied to proceedings which lack both "adjudication" and "bankrupt estate."

But if §57n cannot apply, in cases of composition before adjudication, it ought not to be arbitrarily applied in cases of composition after adjudication. Obviously, the rights of scheduled creditors in composition cases should be the same whether composition precede or follow adjudication.

If, turning from a literal application of the words of §57n, we consider the reason thereof, the conclusion is the same. In ordinary bankruptcy the bankrupt has no interest in his estate. It belongs entirely to his creditors. In re Morton, 118 Fed. 908. In such cases, every creditor is adverse to every other creditor. The fewer the creditors the larger the dividend. §57n is therefore a statute of limitation in favor of creditors in order that the distribution of their estate may be speeded. In re Lane, 125 Fed. 772, 773. But in composition, there are only two parties,—the debtor on one side, and the creditors as a class on the other side. The debtor, instead [fol. 26] of giving up his estate for distribution by a trustee, seeks to bargain with his creditors and invoke the composition machinery of the act in order to coerce a possibly recalcitrant minority.

I think that every creditor scheduled as such, and whether he proves or not, has a right to avail of the debtor's offer "to his creditors"; that the debtor is estopped to deny the right of those he has scheduled as creditors to have the benefit of his offer to his creditors. Scheduled creditors, whether proving or not, have rights against the debtor. Cf. Haley v. Pope, 206 Fed. 269. In the present, as in the usual case, the offer was, as required by §12, to his creditors.

Composition first came into our Bankruptcy Law in 1874, and was modelled on the English Bankruptcy Act of 1869. In re Scott, Fed. Cas. 12,519; Cumberland Glass Co. v. De Witt, 237 U. S. 447, 453; In re Holmes, 15 Blatch. 170. But, while the Bankruptcy Act provides machinery to facilitate this bargaining between debtor, on the one side, and creditors as a class on the other side, composition "is in some respects outside of the Act," by Mr. Justice Day in Cumberland Glass Co. v. De Witt, 237 U. S. 447, 453. In re Lane, 125 Fed. 772. In underlying theory, composition is like an assignment

for the benefit of creditors, which operates as an extra-judicial compounding with creditors. Compare R. L. Mass. c. 203 §41. The debtor must file a schedule of his creditors, and may then, either before or after adjudication, make an express offer to pay his creditors, in cash or securities, a named percentage of their claims. It is not an offer to buy his estate from a trustee; for in the usual case, since the amendment of 1910, there is no trustee. He must offer to pay, and deposit the amount necessary to pay, the named percentage to all his scheduled creditors. Compare In re Harvey, 144 Fed. 901. Creditors not scheduled, or without notice or actual knowledge of the proceedings in bankruptcy, are not affected by a discharge, — or a confirmation of composition, the equivalent of a discharge, §17 (3).

The fact that §12 provides for the allowance of claims in composi- [fol. 27] tion proceedings, ought not to mislead us as to the application of §57n. Of course when, after adjudication, a composition offer is made and claims are presented for allowance, the situation created seems like that arising in ordinary bankruptcy. But, on analysis, it is apparent that a meeting of creditors and the allowance of claims, either after or before adjudication, are merely conditions precedent for determining whether the majority in number and amount of the creditors proving accept the debtor's composition offer. Such proceedings are the necessary means of providing for creditor determination, for or against ordinary bankruptcy. In ordinary bankruptcy, proof of claims is requisite in order to determine the rights of creditors, inter sese, in an estate in which the debtor has no interest whatever. But in composition cases, proof of claims is necessary in order to create the proper voting constituency to act on the debtor's offer to compound with his creditors in a bargain essentially outside of real bankruptcy. It is like registering in order to vote at a political election. Compare In re Atlantic Construction Co., 228 Fed. 571; In re Fox, 6 Am. B. R. 525.

Non-proving creditors lose their right to vote,—they should not lose their right to receive what their debtor has offered them. The statute, §12e, does not require that the consideration be paid to proving creditors only. "The consideration shall be distributed as the judge shall direct." No reason is suggested why every scheduled creditor, whether proving or not, and every proving creditor, whether scheduled or not, should not receive his due proportion of the consideration. So proceeding, the consideration deposited is all distributed to creditors scheduled or proving, and "the case dismissed," §12e. There is no use for any statute of limitations. The debtor, by scheduling creditors, puts them in court for the purpose of receiving what he offers in composition; any non-scheduled creditors who prove are also thus in court.

If we turn to the decided cases, we get little or no help. No Court of Appeals has ever held §57n applicable in composition proceedings. [fol. 28] Judge Lowell's decision in Re Lane, 125 Fed. 772, was in 1902, long before, under the amendment of 1910, composition without adjudication was authorized.

I can find nothing in the opinion of the Supreme Court in the Cumberland Glass case, 237 U. S. 447, 453, indicating that that court even considered the question now before this court. In that case, the court was dealing, in a composition proceeding, with set-off under under §68a, dividing, five to four, on a question entirely remote from the one now before us. In the majority opinion, Mr. Justice Day said: "The nature of composition proceedings is nowhere better stated than by Judge Lowell in In re Lane, 125 Fed. 771, 773." * * * The justice then quotes at length from Judge Lowell's opinion; but ends his quotation with Judge Lowell's discussion of the general nature of composition proceedings, omitting the sentences containing Judge Lowell's conclusion that §57n might, in composition cases, be invoked by a debtor against a scheduled creditor who had not proved within the year. This omission is inconsistent with the view that the Supreme Court was thus, by indirection, approving a doctrine entirely foreign to the question then before that court. I think Judge Lowell's conclusion inconsistent with his own reasoning.

The view of the majority, that even after the amendment of 1910, "It does not follow that adjudication may not thereafter be had for the purpose of barring claims," does not seem to me tenable. The purpose of the amendment of 1910 was to authorize composition without adjudication. By necessary implication it excludes adjudication as a necessary element in composition proceedings.

In no district court decision subsequent to the Act of 1910 do we find any satisfactory discussion of what is now the typical situation,—composition without adjudication. See In re Englanders, Inc., 267 Fed. 1012; Haley v. Pope, 206 Fed. 266; In re French, 181 Fed. 583; In re Bickmore Shoe Co., 263 Fed. 926.

Judge Learned Hand's views so far as expressed in Re Atlantic Construction Co., 228 Fed. Rep. 571, seem nearly, if not quite, in accord with mine. He says: "§57n seems to me to have no appli-[fol. 29] cation whatever to the situation; it concerns only proving claims against the bankrupt estate, and that is quite irrelevant to an offer to the bankrupt's creditors." 228 Fed. 572.

I do not think it can be held that §57n applied to composition cases before the amendment of 1910, and was by that amendment repealed pro tanto by implication. The situation seems rather to be that, before that amendment, the real nature of composition proceedings was not seen in clear perspective.

But the amendment of 1910 brings out in bold relief the real nature of composition proceedings. In essence now a composition before adjudication is a prevention of bankruptcy, a method of avoiding bankruptcy. It contrasts with real bankruptcy,—for the debtor, instead of asking to have, or submitting to having, his estate taken from him for the benefit of his creditors, seeks to bargain with his creditors, invoking the composition provisions of the Act merely for the purpose of coercing an objecting minority.

I find it impossible to see how a debtor who has offered to pay every one of his scheduled creditors a named percentage,—provided a majority in number and amount of those proving assent, and

the court confirms it,—can thereafter be heard to say that his offer applies only to those who have proved. Apart from the technical aspects of this question, it is clear that such construction increases the opportunity for fraud, already sufficient under the composition provisions of the Act. In the case at bar, the debtor offered on February 12, 1921, 25 per cent to a list of scheduled creditors whose claims aggregated $46,630.73. But in some fashion,—whether as a result of the debtor's strategy or not does not appear, proceedings were delayed until March 27, 1922, when the debtor filed a petition for permission to deposit the requisite amount. While the case lay dormant more than thirteen months, creditors whose claims aggregated $12,562.23 neglected to prove their claims. And the debtor now seeks to invoke §57n,—intended to speed the distribution of a real bankruptcy estate,—in order to cut off more than one-quarter [fol. 30] of his own admitted creditors from receiving the 25 per cent offered. True, there is nothing in this record indicating fraud or lack of notice. But the case illustrates the additional opportunities for fraud afforded by misapplying a statute of limitations, intended for creditors only, to a situation where it may redound greatly to the benefit of a debtor.

My views are, in essence, those stated by Referee Remington in 1901—In re Fox, 6 A. B. R. 525, 530:

"It is even doubtful whether the year's limitation for proving claims 'against bankrupt estates', laid down in section 57n, has any application to composition cases; no particular reason exists for requiring creditors to prove their claims at all, since the bankrupt is the only one who is interested in contesting them, and he is estopped by his schedules, except in cases of mistake or fraud. There being no necessity for proof of claims by creditors, what is the applicability of a limitation for proving claims?"

I am aware that for many years the practice has been to require proofs in composition cases, and that some District Courts have applied the limitation of §57n. But I find nothing in the Act, or in any decision binding on us, warranting this practice. I believe it to be inconsistent with the underlying theory of composition, and that it frequently causes, as in this case, results wholly unjust.

[fol. 31] On October 5, 1922, this cause came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

Thereafter, to wit, on the fourth day of January, A. D. 1923, the opinion of the court (page 7) was announced, a dissenting opinion by Anderson, J. (page 11), was filed and the following Final Decree was entered:

IN U. S. CIRCUIT COURT OF APPEALS

FINAL DECREE

January 4, 1923

This case came on to be heard October 5, 1922, upon a petition to revise in matter of law the proceedings of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, January 4, 1923, here ordered, adjudged and decreed as follows: The Judgment of the District Court is affirmed with costs to the Brightwood Bronze Foundry Company.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on the twenty-eighth day of February, A. D. 1923, the following Motion for Stay of Mandate was filed:—

IN U. S. CIRCUIT COURT OF APPEALS

MOTION FOR STAY OF MANDATE—Filed February 28, 1923

And now comes the Nassau Smelting & Refining Works, Ltd., petitioner, in the above-entitled case, and says that it intends to file a petition for certiorari in the United States Supreme Court, and moves that the mandate be stayed until further order of the court.

Nassau Smelting & Refining Works, Ltd., By Its Attorney,
Joseph B. Jacobs.

On the same day, to wit, on the twenty-eighth day of February, A. D. 1923, the following Order of Court was entered:

[fol. 32] IN U. S. CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE

February 28, 1923

Upon motion of petitioner, setting forth that it proposes to file a petition in the Supreme Court for a writ of certiorari, It is ordered that the mandate in this case be, and the same hereby is, stayed until further order of court, upon the condition that said petition is duly filed and presented within the time prescribed by the rules and practice of the Supreme Court of the United States.

By the Court.

Arthur I. Charron, Clerk.

In U. S. Circuit Court of Appeals

Clerk's Certificate

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 18, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including March 3, 1923, in the cause in said court numbered and entitled, No. 1579 (Original), Nassau Smelting & Refining Works, Ltd., Petitioner; In the Matter of Brightwood Bronze Foundry Company, Bankrupt.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this third day of March, A. D. 1923.

Arthur I. Charron, Clerk. [Seal of the United States Circuit Court of Appeals, First Circuit.]

[fol. 33] Writ of Certiorari and Return—Filed June 30, 1923

United States of America, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit Greeting:

Being informed that there is now pending before you a suit in which Nassau Smelting & Refining Works, Limited, is appellant, and Brightwood Bronze Foundry Company, Bankrupt, is appellee, No. 1578, October Term, 1921, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, [fol. 34] do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the fourteenth day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 35] United States Circuit Court of Appeals for the First Circuit

Return on Writ of Certiorari

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued that the certified copy of the record heretofore filed in the Supreme Court of the United States shall constitute the return to the writ of certiorari issued therein.

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court, at Boston, in said First Circuit, this twenty-ninth day of June, A. D. 1922.

Arthur I. Charron, Clerk. [Seal of United States Circuit Court of Appeals, First Circuit.]

[fol. 36] United States Circuit Court of Appeals for the First Circuit, October Term, 1922

[Title omitted]

Stipulation

In the above entitled case, it is agreed that the record heretofore filed in the Supreme Court of the United States in support of the petition for certiorari may be taken as a return on the writ of certiorari.

Joseph B. Jacobs, Jacobs & Jacobs, Attorneys for Petitioner. Harry M. Ehrlich, Attorney for Respondent. Henry Lasker, Attorney for Respondent.

Dated this 21st day of June, 1923.

A true copy.

Attest: Arthur I. Charron, Clerk. [Seal of United States Circuit Court of Appeals, First Circuit.]

[fol. 37] [File endorsement omitted.]

[fol. 38] [File endorsement omitted.]

No. [redacted] 242

Supreme Court of the United States.

October Term, 1922.

No.

NASSAU SMELTING & REFINING WORKS, LTD.,
PETITIONER,

v.

BRIGHTWOOD BRONZE FOUNDRY COMPANY,
RESPONDENT.

Petition for Writ of Certiorari and Brief for Petitioner.

JOSEPH R. JACOBS,
ROBERT P. LEVIS,
JACOBS & JACOBS,
Attorneys for Petitioner.

[illegible] LAW PRINTERS, [illegible]

Supreme Court of the United States.

OCTOBER TERM, 1922.

NASSAU SMELTING & REFINING WORKS, LTD.,
PETITIONER,
v.
BRIGHTWOOD BRONZE FOUNDRY COMPANY,
RESPONDENT.

NOTICE.

The respondent is hereby notified that the petitioner will on Monday, March 19, 1923, upon his verified petition and a copy of the entire record in this cause, at the opening of the Court on that day or as soon thereafter as counsel can be heard, submit a petition for a writ of certiorari, a copy of which and of the brief in support thereof are herewith delivered to you, to the Supreme Court of the United States in its courtroom at the Capitol in the City of Washington, D.C.

JOSEPH B. JACOBS,
ROBERT P. LEVIS,
JACOBS & JACOBS,
Attorneys for Petitioner.

SPRINGFIELD, 1923.

The foregoing notice is hereby accepted and delivery of a copy of the petition for writ of certiorari and brief in support of the petition is hereby acknowledged.

.....

Attorneys for Respondent.

Supreme Court of the United States.

OCTOBER TERM, 1922.

NASSAU SMELTING & REFINING WORKS, LTD.,
PETITIONER,
v.
BRIGHTWOOD BRONZE FOUNDRY COMPANY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the United States Supreme Court:

The petitioner, Nassau Smelting & Refining Works, Ltd., respectfully shows to this Honorable Court as follows:

That it is a corporation duly organized by law, with a usual and principal place of business in the City, County, and State of New York, and is a creditor in the amount of $11,356.44 of the Brightwood Bronze Foundry Company, which was duly adjudicated bankrupt by the District Court of the United States for the District of Massachusetts on the 19th day of November, 1920, upon an involuntary petition in bankruptcy filed on the 5th day of November, 1920.

That previous to the filing of the involuntary petition in bankruptcy the bankrupt made a general assignment for the benefit of its creditors on the 10th day of September, 1920, to one Henry Lasker, the bankrupt's attorney. That the said Henry Lasker

down to the date of the filing of this petition has remained in possession of the assets of the bankrupt.

That after said adjudication in bankruptcy the bankrupt made an offer of composition on February 12, 1921, of twenty-five per cent (25%) cash, and a meeting to consider the composition was held on February 25, 1921.

That the fund necessary to put through said composition has not been deposited with the Clerk of the United States District Court as is required by law.

On the 27th day of March, 1922, the bankrupt filed a petition to be permitted to deposit to meet the composition offer a fund sufficient only to pay those creditors whose claims have hitherto been proved and allowed.

That your petitioner appeared and objected to the aforesaid petition of the bankrupt.

That your petitioner's claim was not filed or allowed within a year of the date of adjudication in bankruptcy, but your petitioner has since filed its claim and seeks to have it allowed in order to share in the composition dividend.

That your petitioner claims the right to have sufficient funds deposited to pay the composition dividend on its claim, irrespective of whether or not its claim was proved and allowed within a year from the date of the adjudication in bankruptcy.

That the matter came on for hearing in the United States District Court for the District of Massachusetts on said petition of the bankrupt and on your petitioner's objection thereto, and the United States District Court decided that, as your petitioner's claim was not proved and allowed within the year, it was not en-

titled to any composition dividend, and that section 57*n* of the Bankruptcy Act limiting the proof and allowance of claims to one year applied to composition proceedings.

The Circuit Court of Appeals, with Anderson, J., dissenting, sustained this ruling of the District Court.

The petitioner submits that the learned Circuit Court of Appeals erred in the following particulars, and prays that this Honorable Court will examine and review the record in this case, and revise the ruling of the said Circuit Court of Appeals:

(1) It is an erroneous interpretation of section 12 of the Bankruptcy Act.

(2) It is erroneous to apply section 57*n* of the Bankruptcy Act to composition proceedings.

(3) It is contrary to the views already intimated by this Court.

(4) It is inconsistent and contrary to well-considered decisions from other Districts.

It is important that the practice on this important point of bankruptcy law should be uniform, and that the proper interpretation of the statute should be established.

Wherefore your petitioner prays that the whole record may be examined, reviewed, and revised by this Honorable Court, and that such orders may be made as justice may require.

And your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the First Circuit, commanding said Court to verify and send to this Court on a day certain, to be therein designated, a full and complete

transcript of the record of all proceedings of said Circuit Court of Appeals in this case (which was entitled in that Court *Nassau Smelting & Refining Works, Ltd., Appellant*, v. *Brightwood Bronze Foundry Company, Appellee, In the matter of Brightwood Bronze Foundry Company, Bankrupt*, and numbered 1579 on the docket of said Court), to the end that said cause may be reviewed and determined by the Court as provided by law; and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate; and that said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

NASSAU SMELTING & REFINING WORKS, LTD.,
By its Attorneys,
JOSEPH B. JACOBS,
ROBERT P. LEVIS,
JACOBS & JACOBS.

COMMONWEALTH OF MASSACHUSETTS.

COUNTY OF SUFFOLK, ss. BOSTON, February 27, 1923.

Joseph B. Jacobs, being duly sworn, deposes and says that he is of counsel for Nassau Smelting & Refining Works, Ltd., petitioner, that he prepared the foregoing petition, and that the allegations therein contained are true to the best of his knowledge and belief.

JOSEPH B. JACOBS.

Subscribed and sworn to before me this 27th day of February, 1923.

CHARLES A. McCARRON,
[Seal] Notary Public.

Supreme Court of the United States.

OCTOBER TERM, 1922.

NASSAU SMELTING & REFINING WORKS, LTD.,
PETITIONER,
v.
BRIGHTWOOD BRONZE FOUNDRY COMPANY,
RESPONDENT.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The effect of a composition proceeding under the Bankruptcy Act is to supersede the bankruptcy proceedings, and substitute the composition proceeding for it.

Cumberland Glass Mfg. Co. v. *De Witt & Co.*, 237 U.S. 447.
Greenbaum v. *United States*, 280 Fed. 474 (C.C.A. 6th).

II.

The bankrupt must deposit a sum sufficient to cover the composition percentage on all debts scheduled.

Bankruptcy Act, sec. 12*b*:

"And the consideration to be paid by the bankrupt to his *creditors*."

Sec. 1, clause 9:

"'Creditor' shall include anyone who owns a demand or claim provable in bankruptcy . . . "

In re Simon Fox, 6 A.B.R. 525.
In re Harvey, 144 Fed. 901.
Lowell on Bankruptcy, p. 384.
Loveland on Bankruptcy (4th ed.), p. 1265.

III.

Section 57*n*, that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication," does not apply to composition proceedings.

In re Simon Fox, 6 A.B.R. 525, at 527:

"Creditors are not bound by the statutory period of one year from the original adjudication in bankruptcy in which to claim their respective shares," in composition proceedings.

At page 530:

"It is even doubtful whether the year's limitation for proving claims *against bankrupt estates,* laid down in section 57n, has any application to composition cases; no particular reason exists for requiring creditors to prove their claims at all, since the bankrupt is the only one who is interested in contesting them, and he is estopped by his schedules. . . . There being no necessity for proof of claims by creditors, what is the applicability of a limitation for proving claims? Moreover, the limitation only pertains to proof against a *bankrupt estate,* but in composition cases there

is, technically speaking, no bankrupt *estate;* the estate has been given back to its original owner."

IV.

Conflict of Decisions.

If the decision of the Circuit Court of Appeals for the First Circuit in this case is allowed to stand, the practice of the First Circuit will differ from the practice in other circuits.

In re Harvey, 144 Fed. 901 (citing *In re Fox* with approval).
In re Aarons, 243 Fed. 634.
In re Englander's, Inc., 267 Fed. 1012.
In re Basha, 200 Fed. 951 (C.C.A. 2d).
In re Atlantic Const. Co., 228 Fed. 571.

V.

Composition before Adjudication.

In 1910 section 12 of the Bankruptcy Act was amended to allow compositions before adjudication. Surely 57*n* cannot apply to composition before adjudication, because there is no time from which the period of one year is to run, and it would be absurd to require creditors to prove their claims within the year from the date of adjudication, in compositions after adjudication, whereas, in compositions before adjudication, the time within which creditors could file claims and receive their dividend would be unlimited (see dissenting opinion of Anderson, J., of the Court below).

Conclusion.

The petitioner submits that the decision of the Court of Appeals, confirming the order of the District Court limiting the deposit to those claims only that have been proved and allowed, was erroneous, and the Circuit Court of Appeals should have rendered a decision reversing the order of the District Court.

NASSAU SMELTING & REFINING WORKS, LTD.,
By its Attorneys,
Joseph B. Jacobs,
Robert P. Levis,
Jacobs & Jacobs.

Supreme Court of the United States.

October Term, 1923.

No. 242.

NASSAU SMELTING & REFINING WORKS, LTD.,
PETITIONER,

v.

BRIGHTWOOD BRONZE FOUNDRY COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Brief for Petitioner.

JOSEPH B. JACOBS,
JACOBS & JACOBS,
Attorneys for Petitioner.

45 Milk Street,
Boston, Mass.

ADDISON C. GUTCHELL & SON, LAW PRINTERS, BOSTON.

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v.
BRIGHTWOOD BRONZE FOUNDRY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

On the 5th day of November, 1920, an involuntary petition in bankruptcy was filed in the United States District Court for the District of Massachusetts against the Brightwood Bronze Foundry Company (Rec. p. 1), and the said Brightwood Bronze Foundry Company was adjudicated a bankrupt on the 19th day of November, 1920 (Rec. p. 2).

Previous to the filing of the involuntary petition in bankruptcy, to wit, on the 10th day of September, 1920, the bankrupt made a general assignment for the benefit of its creditors to its attorney, Henry Lasker (Rec.

p. 3), and the assignee, down to date, has remained in possession of the assets of the bankrupt (Rec. p. 3).

The bankrupt filed schedules as is required by section 7, clause 8, of the Bankruptcy Act, and set forth in its schedules that it was indebted to the Nassau Smelting & Refining Works, Ltd., the petitioner, in the sum of $11,354.40 (Rec. p. 3).

On February 12, 1921, the bankrupt made an offer of composition to its creditors of twenty-five per cent (25%) cash; and, pursuant thereto, a meeting of creditors to consider the composition was held on February 25, 1921 (Rec. p. 3).

On March 17, 1922, a special meeting of creditors was held to elect a trustee, and one Harry M. Ehrlich was elected trustee, but never qualified (Rec. p. 3).

On the 27th day of March, 1922, over a year subsequent to the date of the meeting held to consider the composition, the bankrupt filed a petition in the United States District Court for the District of Massachusetts to be permitted to deposit, to meet the composition offer, a fund sufficient only to pay those creditors whose claims had been seasonably proved (Rec. p. 4).

The same day the Court issued an order that on the 6th day of April, 1922, before said Court at Boston, all known creditors and other persons of interest might appear to show cause, if any they had, why the prayer of said petitioner should not be granted (Rec. p. 4).

The Nassau Smelting & Refining Works, Ltd., the petitioner, on the 1st day of April, 1922, appeared and objected to the limiting of the amount of the deposit to only those creditors whose claims had been proved and allowed (Rec. p. 5). On the 8th day of May, 1922,

the District Court entered an order granting the petition of the bankrupt (Rec. p. 5).

The petitioner did not file or offer for proof its proof of claim within a year of the date of adjudication, but on the 6th day of April, 1922, the Nassau Smelting & Refining Works, Ltd., the petitioner, filed its proof of claim in order to share in the composition offer made (Rec. p. 3).

The District Court for the District of Massachusetts filed a memorandum of decision on the 5th day of May, 1922 (Rec. p. 6), ruling that section 57*n* of the Bankruptcy Act, that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication," applied, and that the claim of the petitioner need not be provided for in the deposit to be made by the bankrupt to meet the terms of the composition offer (Rec. p. 5).

The Nassau Smelting & Refining Works, Ltd., the petitioner, being aggrieved by the order of the District Court limiting the deposit, filed a petition to superintend and revise in the Circuit Court of Appeals for the First Circuit (Rec. p. 11), and assigned as errors the following:

I.

That the United States District Court for the District of Massachusetts erred in granting the motion of the bankrupt that it be allowed to deposit, for its composition, only a sum sufficient to pay the composition dividend on claims proved and allowed.

II.

That the United States District Court for the District of Massachusetts erred in not requiring the

bankrupt to deposit a sum sufficient to pay the composition dividend on the total amount of claims scheduled (Rec. p. 7).

The case was heard in the Circuit Court of Appeals for the First Circuit, and the majority of the Court ruled that section 57*n* of the Bankruptcy Act applied (Rec. p. 14, and opinion of Bingham, J.).

The Court, on the 4th day of January, 1923, entered a decree affirming the order of the District Court (Rec. p. 21).

Anderson, J., wrote a dissenting opinion, ruling that 57*n* of the Bankruptcy Act did not apply to composition cases (Rec. p. 17).

On the 7th day of May, 1923, the Nassau Smelting & Refining Works, Ltd., filed a petition for certiorari in this Honorable Court, which petition was granted, and on June 30, 1923, the certiorari and return were filed (Rec. p. 22).

Argument.

I.

The effect of the composition proceedings under the Bankruptcy Act is to supersede the bankruptcy proceedings, and to substitute the composition proceeding for it.

Cumberland Glass Mfg. Co. v. *DeWitt Co.*, 237 U.S. 447:

> "It is thus apparent that, although the composition is provided for by the bankruptcy act, it is in some respects outside of the Act, for it is provided that, if the composition is not confirmed,

the estate shall be administered in bankruptcy, as in the Act provided."

Greenbaum v. *United States*, 280 Fed. 474 (C.C.A. 6th).

Merchants Bank of Mobile v. *Zadek et al.*, 84 So. R. 715; 45 A.B.R. 520:

"A composition is in a sense a substitute for bankruptcy proceedings, and in a composition the creditor gets, not his share of the bankrupt estate, but what he bargained for, and has no right to claim more. Cumberland Glass Co. v. DeWitt, 237 U. S. 447. An agreement of composition entered into by a number of creditors, each acting on the faith of the engagement of the others, will, in the absence of the statute, be binding upon them all; for each has the undertaking of the others as a consideration for his own engagement; and the creditor who breaks the agreement perpetrates a fraud upon those who adhere to it. 1 Smith's Lead. Cas. (9th Ed.) pp. 612, 628, 629. The effect of the Bankruptcy Act in this regard is to treat all creditors as a class and to enforce the will of the majority upon the minority. In other respects the right of contract remains unimpaired. Cumberland Glass Co. v. DeWitt supra."

American Improvement Co. v. *Lilienthal*, 184 Pac. R. 692; 44 A.B.R. 365.

II.

The bankrupt must deposit a sum sufficient to cover the composition percentage on all debts scheduled.

Bankruptcy Act, sec. 12*b*:

"The application for the confirmation of a composition may be filed in the court of bankruptcy, after, and not before it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, and which number must represent a majority in amount of said claims, and the *consideration to be paid* by the bankrupt *to his creditors*, and the money necessary to pay all debts which have priority and the expense of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the Judge."

It is to be noted that section 12*b* does not provide that the consideration is to be deposited only for creditors who have *proved* their claims.

Section 1, clause 9:

"'Creditor' shall include anyone who owns a demand or claim provable in bankruptcy."

In re Simon Fox, 6 A.B.R. 525.
In re Harvey, 144 Fed. 901.
Lowell on Bankruptcy, p. 384.
Black on Bankruptcy, sec. 652.

III.

(A.)

Section 57*n* of the Bankruptcy Act, that "claims shall not be proved against a bankrupt estate subsequent to one year after adjudication," does not apply to composition proceedings.

In re Simon Fox, 6 A.B.R. 525, at 527:

"Creditors are not bound by the statutory period of one year from the original adjudication in bankruptcy in which to claim their respective shares," in composition proceedings.

At page 530:

"It is even doubtful whether the year's limitation for proving claims *against bankrupt estates*, laid down in section 57n, has any application to composition cases; no particular reason exists for requiring creditors to prove their claims at all, since the bankrupt is the only one who is interested in contesting them, and he is estopped by his schedules. . . . There being no necessity for proof of claims by creditors, what is the applicability of a limitation for proving claims? Moreover, the limitation only pertains to proof against a *bankrupt estate*, but in composition cases there is, technically speaking, no bankrupt *estate;* the estate has been given back to its original owner."

In re Harvey, 144 Fed. 901 (citing *In re Fox* with approval).

In re Aarons, 243 Fed. 634.

In re Englander's, Inc., 267 Fed. 1012.

In re Basha, 200 Fed. 951 (C.C.A. 2d).

In re Atlantic Const. Co., 228 Fed. 571.

In re Haley v. *Pope*, 206 Fed. 266 (C.C.A. 9th).

In re Watman, Komopolsky & Bernstein, 291 Fed. Rep. 886.

(B.)

There should be uniformity of procedure in compositions before adjudication with those subsequent to adjudication.

Section 57*n* can certainly not apply to compositions before adjudication because there is no date from which the time is to run. It certainly will be a benefit generally that composition proceedings be uniform, and it would be manifestly unwise to have one rule as to compositions before adjudication, and another rule as to compositions after adjudication (see dissenting opinion, Anderson, J., Rec. p. 19).

The purpose in having a meeting of creditors to vote on whether the composition shall be accepted or not by the creditors is merely to safeguard the minority.

> Bankruptcy. A Study in Comparative Legislation by S. Whitney Dunscombe, Jr.
>
> Vol. 2. Studies in History, Economics and Public Law. Columbia University. Page 85:
>
> "It is usually agreed that the debtor shall be given an extension of time in which to meet his engagements and shall be obliged to pay only a certain portion of his debts upon furnishing adequate security. If unanimity among the creditors was necessary for the purpose, it would be almost impossible to obtain a satisfactory arrangement. The will of the majority is, therefore, made to bind the minority, but to prevent injustice to individuals, the rights of the minority have been safeguarded as far as practicable. . . ."

Page 87:

> "Since the composition compels the opposing creditors to accept what may be a very considerable reduction of their claims, the French legislation provides for their protection the safeguard of a double majority, a majority in number, so that the will of one or several important creditors will not be imposed upon the others, and a majority of three-fourths in value so that the small creditors may not subject the others to heavy losses. . . . To the minority, composed of dissenting and nonresident creditors, another protection is offered by the provision that the composition, although it has been regularly voted, will not be effected until it has received the . . . confirmation of the Court."

Page 101:

> "In every country, it is to be noticed, that composition must receive the approval of a competent judicial authority."

It is submitted that composition originally arose in continental countries, and was adopted in England in the Bankruptcy Act of 1869. It first appeared in the United States in the amendment of 1874 to the Bankruptcy Act of 1867, which provided for composition after adjudication; and again in the Bankruptcy Act of 1898, where compositions after adjudication were provided for; and subsequently amended in 1910, providing for compositions before adjudication; in every case adopting the two safeguards provided for in continental countries, namely, a double majority.

In other words, the machinery of the bankruptcy court is used merely to effectuate the offer of the bankrupt (see opinion of Anderson, J., Rec. p. 18).

(C.)

The confirmation of a composition gives the debtor a discharge.

Bankruptcy Act, sec. 14*c*:

> "The confirmation of a composition shall discharge the bankrupt from his debts other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

Jacobs v. *Fensterstock*, 1 A.B.R. (N.S.) 14 (N.Y. Ct. of App.).
In re Mirkus, 289 Fed. 732 (C.C.A. 2d).

(D.)

A creditor who has not filed his claim may oppose a discharge.

Sec. 14*b* of the Bankruptcy Act:

> "The judge shall hear the application for discharge and such proofs and pleas as may be made in opposition thereto by the trustee or *other parties in interest.*"

In re Levey, 133 Fed. 572.

Haley v. *Pope*, 206 Fed. 266 (C.C.A. 9th), at 268:

> "In the case of re Barrager (D.C.) 191 Fed. 247, it was held that where certain persons were named

in the bankrupt's schedules as creditors that fact constituted prima facie evidence that they were creditors, and entitled to oppose the granting of the discharge; though they had not filed or made formal proof of their claims—citing numerous cases."

7 C.J. 369, sec. 652.
General Orders in Bankruptcy, 32.

(E.)

A petition for discharge must be filed within the next twelve months subsequent to adjudication, unless a further six months is given by the Court because of unavoidable delay.

Bankruptcy Act, sec. 14*a*.

(F.)

The statute does not limit the time for making a composition to that within which a discharge may be granted.

Loveland on Bankruptcy (3d ed.), p. 719.

Bankruptcy Act, 12*c*:

"A date and place with reference to the convenience of the *parties in interest*, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation."

Remington on Bankruptcy (2d ed.), vol. 3, sec. 2377:

"In general, the procedure on opposition to con-

firmation of a composition is similar to that on opposition to discharge."

Bank v. *Doolittle*, 107 Fed. 236.

Under section 14*b* of the Bankruptcy Act, referring to discharge, "parties in interest" can file objections to the discharge.

Bankruptcy Act, sec. 14*c*:

"The confirmation of the composition shall discharge a bankrupt from his debts. . . ."

Brandenberg on Bankruptcy (4th ed.), sec. 1213:

"A *party in interest* being anyone affected is entitled to be heard so that anyone having a provable claim, although it has not been proved and allowed . . . should be heard."

In re Walker, 96 Fed. 550.

It is therefore submitted that, as section 12*c* and section 14*b* of the Bankruptcy Act give to *parties in interest* the right to be heard and to file objections, a creditor who has a provable claim, even though it has not been allowed, can file objections to a composition offer.

(G.)

All creditors are entitled to notice of an application for confirmation of a composition.

Section 58*a* of the Bankruptcy Act does not limit notice of application for the confirmation of compositions to *only* those creditors who have proved their

claims. All creditors, even subsequent to a year from the date of adjudication, are entitled to notice.

IV.

Conclusion.

The petitioner respectfully submits that composition is an agreement by a bankrupt with his creditors to substitute for bankruptcy proceedings a private arrangement whereby each creditor is to get a definite sum bargained for, and that the whole composition proceeding is a substitute for bankruptcy, and that the machinery of the bankruptcy court is used merely to enforce the will of the majority upon the minority, but in all other respects the contract of the bankrupt with his creditors is unimpaired and can be enforced apart from bankruptcy proceedings. Therefore a creditor is not required to file his claim within a year from the date of adjudication in order to obtain the amount offered to each creditor in composition by the bankrupt.

NASSAU SMELTING & REFINING WORKS, LTD.,
By its Attorneys,
Joseph B. Jacobs,
Jacobs & Jacobs.

Supreme Court of the United States.

OCTOBER TERM, 1922.

NASSAU SMELTING & REFINING WORKS, LTD.,
Petitioner,
v.
BRIGHTWOOD BRONZE FOUNDRY COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

Section 57 *n* of "An act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898," and amendments thereto, provides that "claims shall not be proved against a bankrupt estate subsequent to one year after adjudication."

It is an absolute prohibition against proof and allowance of claims when so presented—

In re Knosco, 208 Fed. 201;
In re Daniel, 29 A.B.R. 284;
In re Mayer, 181 Fed. 904;
Bray v. *Cobb,* 101 Fed. 270;
In re Schaffer, 104 Fed. 982—

and, instead of being an enlargement of a creditor's rights, operates as a restriction, and does not authorize a withholding of dividends when ready, on proved

and allowed claims, nor the delay of the final settlement and closing of an estate, when ready to be closed, nor the withholding from other creditors of money due them to give a *negligent* creditor further opportunity for the proof and allowance of his claim.

In re Stein, 94 Fed. 124.

The creditor who fails to prove his claim within one year from the date of adjudication has no standing in composition proceedings.

Mr. Justice Dodge, in the respondent's district, in—

In re French, 181 Fed. 483;
In re Bickmore Shoe Co., 263 Fed. 926.

There is no contention by the petitioner that the failure to prove his claim was by reason of fraud, mistake, or accident, but the Courts have held that, even if there was this contention, or that it received no notice of the pendency of the bankruptcy proceedings, or was not scheduled as a creditor, or that it was misled by a statement in the bankrupt's schedules as to the value of a particular asset, it would not entitle it to file its proof after the year.

In re Sanderson, 120 Fed. 278.
In re Muskoka Lumber Co., 127 Fed. 886.
In re Lane, 125 Fed. 772.
In re Peck, 168 Fed. 48.
See also pages 457 and 458, Brandenburg on Bankruptcy (4th ed.), 1917.

The bankrupt may be heard to object to the allowance in composition of a claim offered for proof after

the expiration of a year, though the same has not been scheduled.

In re Lane, 125 Fed. 772.

A creditor who has not proved his claim does not acquire any rights superior to those who do; but if the claim is scheduled, it will be released by discharge, and as a penalty he loses his dividend. Such creditor has no rights in composition proceedings.

In re Mathers, 225 Fed. Cases No. 9274.

A creditor whose right to prove his claim is barred by the one-year limitation has no voice in a composition proceeding.

Collier's Bankruptcy, 1921 (12th ed.), p. 319.

In re French, 181 Fed. 583.

The petitioner's contention that section 57 *n* does not apply in composition proceedings is clearly untenable; the familiarity with the rule that, "after the confirmation of the composition and the distribution of the consideration, the case is to be dismissed"; and also, "when the order of dismissal is made, all proceedings are then at an end," makes apropos the queries: "What proceedings are at an end?" and "By what statute or statutes are the proceedings regulated until the dismissal takes place?" Clearly they are governed by all sections of the Bankruptcy Act until such dismissal takes place. If this follows, obviously section 57 *n* does apply.

Composition is a proceeding in bankruptcy.

Wilmot v. *Mudge,* 103 U.S. 317.

The petitioner offers the suggestion that "the consideration to be paid by the bankrupt to his creditors," and "creditor shall include anyone who owns a demand or claim provable in bankruptcy."

The respondent's answer to this claim is that the petitioner's claim is not one *provable* in bankruptcy.

> "If proof of claim has become barred by Section 57 n, its owner has ceased to own any demand or claim provable in bankruptcy and I am unable to see how he can maintain any right to recognition by the Court as a creditor.
>
> "So far as Re Fox 6 A.B.R. is to the contrary, the reasons against the opinion there expressed seem to me more convincing than those in its favor."
>
> From the opinion of Mr. Justice Dodge in *In re French*, 181 Fed. 483.

Section 12 *e* provides that, "Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided." The petitioner does not claim that confirmation has taken place in the proceedings to date, and it is therefore reasonable to argue that, until confirmation takes place, the estate should be administered according to the Bankruptcy Act, as we know of no other federal procedure to govern the proceeding.

The petitioner urges consideration of the case of *Cumberland Glass Mfg. Co.* v. *DeWitt & Co.*, 237 U.S. 447, and attention is called to the following from the opinion, at page 454:

"True the composition proceedings arise from the bankruptcy proceedings, and this part of the statute is to be construed with the entire Act."

Again, the petitioner advances the case of *Greenbaum* v. *United States,* 280 Fed. 474, on his first proposition, and the language used there was as follows: ". . . the composition proceedings having the effect, when confirmed by the Court, of superseding the bankruptcy proceedings." The words "when confirmed by the Court" might well stand out in italics, for until that time we are still governed by the Bankruptcy Act, of which section 57 *n* is a part. In the case at bar confirmation of the composition has not yet taken place.

Concerning the petitioner's fifth proposition in its brief, as to the amendment in 1910, to section 12, allowing composition before adjudication, the explanation is very clear.

An adjudication of the bankrupt took place on November 19, 1920.

Section 1 of the Bankruptcy Act defines "Adjudication" as follows: "Adjudication shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt. . . ."

Therefore, if a composition is offered before adjudication, it is not within the purview of the Bankruptcy Act, for he is not yet a bankrupt, and there is no bankrupt estate. Therefore the application of section 57 *n* cannot be made. It is for this reason that Congress had to pass a special act making it possible to offer a composition before adjudication; the inevitable

conclusion being that, as soon as there is an adjudication, section 57 *n* applies the limitation.

A fair inference that may well be drawn from facts such as this case presents is that a creditor with a large claim may hold out indefinitely against the bankrupt with a view to gaining a higher percentage on his claim as an inducement to come in under the composition proceedings. He would thereby obtain a larger dividend than those creditors who were more vigilant and filed within the required time. This situation would open the door to fraud.

Conclusion.

The respondent urges that the petition be denied, as upon the face of the petition and briefs it is apparent that the decision of the lower court was correct.

BRIGHTWOOD BRONZE FOUNDRY COMPANY,
By its Attorneys,
Harry M. Ehrlich,
Henry Lasker.

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 242.

NASSAU SMELTING & REFINING WORKS, LTD.,

PETITIONER,

v.

BRIGHTWOOD BRONZE FOUNDRY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT.

This is a composition proceeding in bankruptcy, and the matter before this Honorable Court hinges upon the right of the petitioner to prove a claim and have it allowed, after a year from the date of adjudication. The offer of composition was filed a little less than three months after the adjudication; the petitioner's claim was filed for allowance about a year and five months after adjudication.

Section 57*n* of the National Bankruptcy Act of 1898 provides that "claims shall not be proved against a bankrupt estate subsequent to one year after adjudication.

Section 1 of the National Bankruptcy Act of 1898 defines "Adjudication" as follows: "'Adjudication'

shall mean the date of entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt. . . ."

As soon as there is an adjudication, section 57 of said Act then provides for the proving and allowing of claims.

Section 57*n* then applies the limitation.

Attention is called to section 12*c* of an Act to Establish a Uniform System of Bankruptcy throughout the United States, 1898, as Amended by the Acts Approved February 5, 1903, June 15, 1906, and June 25, 1910, which provides as follows:

> "Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided."

There is no contention made that confirmation of the composition was ever applied for in the case at bar.

It therefore follows that the words "the estate shall be administered in bankruptcy as herein provided" control the proving and allowing of claims, which is strictly limited by section 57*n*.

This is a prohibitory clause, and claims can only be filed when the bankrupt fraudulently made it appear that there are no assets in the estate. (There is no such contention of fraud in this case.)

> Collier on Bankruptcy (9th ed.), 1912, p. 747.

Section 57*n* is an absolute termination of the Court's power to allow claims that are presented after the expiration of one year.

Remington on Bankruptcy (3d ed.), 1923, vol. 2, sec. 872.
In re Shaffer, 4 A.B.R. 728; 104 Fed. 982.
In re Hawk, 8 A.B.R. 71; 114 Fed. 916.
In re Hilton, 104 Fed. 981.

To same effect in composition cases:

In re Brown, 10 A.B.R. 588; 123 Fed. 336.
In re Ingalls Brs., 13 A.B.R. 512; 137 Fed. 517.
In re Baird & Co., 18 A.B.R. 228.
In re Pettingill & Co., 14 A.B.R. 763.
In re Bickmore Shoe Co., 45 A.B.R. 24; 263 Fed. 926.
In re Co-operative Knitting Mills Co., 30 A.B.R. 181; 202 Fed. 1016.
In re Daniel, 29 A.B.R. 284; 193 Fed. 772.
In re Trion Mfg. Co., 35 A.B.R. 480; 224 Fed. 521.
In re Knosco, 31 A.B.R. 238; 208 Fed. 201.
In re Blond, 34 A.B.R. 193; 188 Fed. 452.

And, instead of being an enlargement of a creditor's rights, operates as a restriction, and does not authorize the withholding of dividends when ready, on proved and allowed claims, nor the delay of the final settlement and closing of an estate, when ready to be closed, nor the withholding from other creditors of money due

them to give a negligent creditor further opportunity for the proof and allowance of his claim.

In re Stein, 94 Fed. 124.

Composition proceedings arise from the bankruptcy proceedings, and this part of the statute is to be construed with the entire Act.

Wilmot v. *Mudge*, 103 U.S. 217.

The creditor who fails to prove his claim within one year from the date of adjudication has no standing in composition proceedings.

In re French, 25 A.B.R. 77; 181 Fed. 583.
In re Bickmore Shoe Co., 45 A.B.R. 24; 263 Fed. 926.

There is no contention in the case at bar that the creditor failed to make his claim by reason of fraud, mistake, or accident, but the Courts have held that, even if there was this contention, or the contention that he received no notice of the pendency of the bankruptcy proceedings, or was not scheduled as a creditor, or that he was misled by a statement in the bankrupt's schedules as to the value of a particular asset, it would not entitle him to file his proof after the year.

In re Sanderson, 120 Fed. 278.
In re Muskoka Lumber Co., 11 A.B.R. 761; 127 Fed. 886.
In re Lane, 125 Fed. 772.
In re Peck, 21 A.B.R. 707; 168 Fed. 48.
See also pages 457 and 458, Brandenburg on Bankruptcy (4th ed.), 1917.

In re Lane, 125 Fed. 772, discusses the right to prove after one year, and this case was cited with approval by the Supreme Court in—

> *Cumberland Glass Co.* v. *De Witt*, 237 U.S. 447, 453.

> "The entire theory of the Bankrupt Act as stated by the cases, would seem to be the settlement of the estate in bankruptcy within a reasonable time. Congress, in its wisdom, has said 'claims shall not be proved against the bankrupt estate subsequent to one year.' This provision must be strictly construed against the creditor, in order to carry out the liberal spirit shown by the other provisions of the Act, toward the debtor."

> *In re Muskoka Lumber Co.*, 11 A.B.R. 761; 127 Fed. 886.

To be entitled to a share in the distribution of the consideration a creditor must have filed and proved his claim within the time and in the manner provided for by section 57*n*, of the Bankruptcy Act.

> Brandenburg on Bankruptcy (4th ed.), 1917, p. 921, sec. 1224.
> *In re French*, 25 A.B.R. 77; 181 Fed. 583.

The bankrupt may be heard to object to the allowance in composition of a claim offered for proof after the expiration of a year, though the same has not been scheduled.

> *In re Lane*, 125 Fed. 772.

A creditor who has not proved his claim does not acquire any rights superior to those who do, but if the claim is scheduled, it will be released by the discharge, and as a penalty he loses his dividend. Such creditor has no rights in composition proceedings.

In re Mathers, 225 Fed. Cases No. 9274.

A creditor whose right to prove his claim is barred by the one-year limitation has no voice in composition proceedings.

Collier's Bankruptcy, 1921 (12th ed.), p. 319.
In re French, 25 A.B.R. 77; 181 Fed. 583.

HARRY M. EHRLICH.
HENRY LASKER.

NASSAU SMELTING & REFINING WORKS, LTD. *v.* BRIGHTWOOD BRONZE FOUNDRY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 242. Argued April 28, 1924.—Decided May 26, 1924.

A creditor whose claim was included in the schedules is entitled to share in a composition offered by a bankrupt and duly accepted by the required majority, although his claim was not proved within a year after adjudication. P. 270.

286 Fed. 72, reversed.

CERTIORARI to an order of the Circuit Court of Appeals which affirmed an order of the District Court limiting the deposit to be made in satisfaction of a composition in bankruptcy to the amount required for claims proven within the year following adjudication.

Mr. Joseph B. Jacobs for petitioner.

Mr. Harry M. Ehrlich, with whom *Mr. Henry Lasker* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

On November 19, 1920, the Brightwood Foundry Company was adjudged a bankrupt by the District Court of Massachusetts. On February 12, 1921, it made an offer of composition to its creditors. On February 25, 1921, the meeting to consider the offer was held.[1] The list of

[1] A voluntary assignment for the benefit of creditors had been made September 10, 1920. The creditors elected a trustee in bankruptcy at a special meeting held March 17, 1922, but he did not qualify. The assignee under the voluntary assignment remained in possession of the assets formerly belonging to the bankrupt.

creditors provided for in § 7(8) of the Bankruptcy Act (July 1, 1898, c. 541, 30 Stat. 544, 548), had been filed by the bankrupt on February 16, 1921. Among those scheduled, was the Nassau Smelting & Refining Works, with a claim of $11,354.40. It had due notice of all proceedings; but failed to present its claim for proof until more than a year after the adjudication. No order was made either allowing or disallowing it. On March 27, 1922—more than a year after the meeting to consider the offer in composition—the bankrupt filed a petition in which it alleged that the offer had been accepted by the requisite majority of creditors, and that many who had been duly scheduled failed to prove their claims within the year after adjudication as provided by § 57n. It prayed for an order that only such sum be deposited as would be required to pay, in composition, claims seasonably proved. After due hearing, the prayer of the bankrupt was granted. Objection had been made by the Nassau Works; and it filed a petition to revise under § 24b. The order was affirmed by the Circuit Court of Appeals, Circuit Judge Anderson dissenting, 286 Fed. 72; and a petition for a writ of certiorari was granted. 261 U. S. 612. The question for decision is whether the deposit must include the amount required to pay creditors who were named in the schedule but failed to prove their claims within one year after the adjudication. In other words, are such creditors entitled to the benefit of the composition?

The Bankruptcy Act provides, in § 57n, that "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication;" in § 12a, that "a bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, . . . he has . . . filed in court . . . the list of his creditors required to be filed by bankrupts;" and that "action upon the petition for adjudication shall be delayed until

it shall be determined whether such composition shall be confirmed"; in § 12b, that the application for the confirmation of a composition may not be filed in the court until "it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors . . . have been deposited in such place as shall be designated by and subject to the order of the judge;" and in § 12e, that "upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed." [2]

Composition is a settlement by the bankrupt with his creditors. In a measure, the composition supersedes, and is outside of, the bankruptcy proceedings. *Cumberland Glass Co.* v. *DeWitt*, 237 U. S. 447, 454. It originates in a voluntary offer by the bankrupt; and results, in the main, from voluntary acceptance by his creditors. It cannot be confirmed unless there has been such acceptance by the requisite majority. When confirmed the bankrupt is discharged from all debts "other than those agreed to be paid by the terms of the composition and those not affected by a discharge." § 14c. Thus, the composition binds creditors with scheduled claims, although they do not prove. It may be effected before the adjudication.[3] Where the assets have passed to the trustee pursuant to the adjudication, they are revested in the bankrupt.

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[2] The official form [No. 61] of "Application for Confirmation of Composition" recites that after the bankrupt "had filed in Court . . . a list of his creditors, as required by law, he offered terms of composition to his creditors . . . ;" and "that the consideration to be paid by the bankrupt to his creditors . . . has been deposited, etc."

[3] See Act of June 25, 1910, c. 412, § 5, 36 Stat. 838, 839.

There is no provision in the act which declares, in terms, that the offer extends only to those who prove their claims. Why should proof, within the year, of the existence of the debt be required where, by including the claim in the schedule, it has been admitted by the bankrupt? Obviously, § 57n does not operate to exclude any creditor from the benefits of the composition, where the offer is made before there is an adjudication.[4] Section 57n would, also, have no application in a great majority of composition cases in which there has been an adjudication. For the offer is ordinarily made in order to enable the debtor to resume his business. In the normal case, the bankrupt is impelled by vital interests, not only to make the offer promptly, but to expedite confirmation. Interruption incident to delay necessarily impairs the value of a business as a going concern. Thus, the composition is usually carried through within the year. Creditors who have failed to prove their claims before confirmation (from inadvertence or because of their doubt whether it was worth the trouble and expense) are usually spurred to activity by notice that money on deposit awaits their application. The cases are rare in which a scheduled creditor who has had due notice fails to call, within the year, for the money awaiting him.

Where the distribution is of the bankrupt estate, each creditor has an interest in the claim which any other creditor may assert. He is interested in limiting the amount of claims to be allowed, because the greater the aggregate, the smaller (except where there is a surplus) will be his dividend. Each creditor is interested, also, in limiting the time within which others may prove, because distribution cannot be made until the close of that period. But where there is a composition, neither the amount

[4] Judge Anderson states (p. 75): "In recent years more than two-thirds of the composition cases in this district have been without adjudication."

which a creditor receives, nor the time when he receives it, can be affected by the amount of others' claims, or by the time of proof, or by their failure to prove.[5] The rights of each creditor are fixed by the terms of the debtor's offer, subject only to its confirmation and the judge's order of distribution. Nor can the time of proof of claims, as distinguished from their allowance, be of legitimate interest to the bankrupt.[6] His rights, also, are fixed by the offer, unless where the legality or the amount of a claim is questioned. No reason is suggested why Congress should have wished to bar creditors from participation in the benefits of a composition merely because their claims were not proved within a year of the adjudication. Failure to prove within the year does not harm the bankrupt. Why should he gain thereby? And why should the creditor be penalized by a total loss of his claim?

The language of the act tends to support the contention that proof within the year is not essential to participation in the benefits of the composition. Section 57n declares that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication." There is no "bankrupt estate" where there is no adjudication. And even where there is an adjudication, the proof made

[5] Prior to confirmation, he may have this remote interest in the allowance, as distinguished from the proof, of the claims of others. If he favors confirmation, he will be interested in having allowed the claims of other friendly creditors whose acceptance is needed to make up the requisite majority. If he opposes confirmation, he will be interested in having claims of friendly creditors disallowed and of having those of hostile creditors allowed. He may also be interested in enquiring whether a claim scheduled is fraudulent. This is equally true of cases where there has been and where there has not been an adjudication.

[6] He may conceivably be interested in having a claim allowed or disallowed because of its effect upon the acceptance of his offer by the requisite majority of creditors. Here, also, this remoter interest is the same whether there has been an adjudication or has not.

is not against the "bankrupt estate," if a composition follows. The claim is against funds deposited by the debtor pursuant to a bargain with his creditors. Allowance of a claim is necessary to qualify one as a voter on the question of acceptance. Hence, provision for such allowance had to be made. § 12a. But after the composition has been confirmed, allowance of a claim is not necessary for the purpose of establishing it as against the debtor, who is then alone interested, if he has already admitted the liability by including it in his schedule. Compare *Haley* v. *Pope*, 206 Fed. 266. Here the offer was made within three months of the adjudication. It confessedly extended to all scheduled creditors who should prove within the year. No reason is shown why it should be limited to these. *In re Atlantic Construction Co.*, 228 Fed. 571; *Matter of Fox*, 6 Amer. Bank. Rep. 525.

Where the offer of composition is not made until after the expiration of the year the question may be different.

Reversed.